Mohd Amin bin Abdullah @ Kanaperan a/l Ramadass v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41-25 OF 1995
KC VOHRAH J
25 APRIL 1998

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Magistrate made a finding that prosecution had proved its case on a prima facie basis — Whether magistrate had seriously misdirected herself on the rules relating to the standard of proof at the end of the prosecution's case — Whether misdirection was merely on procedural law and not on substantive law — Whether misdirection could be cured by s 422 of the Criminal Procedure Code (FMS Cap 6) — Whether there was maximum evaluation of evidence tendered by witnesses*

The appellants were charged at the Kuala Lumpur Magistrates' Court on 14 March 1992 before a magistrate. The magistrate over a period of 6½ months heard 34 witnesses for the prosecution. On 11 January 1993, another magistrate took over the hearing of the case. The second magistrate rejected an application for a trial de novo and proceeded with the trial. She heard the evidence of an additional 38 witnesses before the prosecution closed its case on 17 May 1993. When the prosecution closed its case before the second magistrate after the 72nd witness, counsel for each of the appellants argued that no prima facie case had been made out against the appellants. The learned deputy public prosecutor on the other hand argued that a prima facie case had been made out and relied on *Haw Tua Tau v PP* [1981] 2 MLJ 49 and *Munusamy v PP* [1987] 1 MLJ 492. At that time, the Supreme Court had not given its decision on *Khoo Hi Chiang v PP* [1994] 1 MLJ 265. After the submissions at the close of the case for the prosecution, on 16 June 1993 the learned magistrate, relying *Haw Tua Tau* with its prima facie test, called upon the appellants to make their defence on the charges preferred against them. After the appellants had made their defence, both of them were convicted on all the charges. The first appellant appealed.

Held, ordering a retrial:

When the magistrate made the decision to call the appellants to make their defence, she had clearly made a finding that the prosecution had proved its case on a prima facie basis. Thus, the learned magistrate had seriously misdirected herself on the rules relating to the standard of proof at the end of the prosecution's case. The serious misdirection was not merely on procedural law but on substantive law. Therefore, such misdirection could not be cured by s 422 of the Criminal Procedure Code (FMS Cap 6) (see pp 126I and 127A, H).

Furthermore, not only was there no maximum evaluation of the evidence, the fact remained that the second magistrate continued the hearing of the case from the 35th to the 72nd witnesses and did not

see nor hear the earlier 34 witnesses. Although the second magistrate had no duty to critically examine the evidence recorded by the first magistrate against the charges so long as there was evidence which was not inherently incredible, there is nothing in the contemporaneous record to show that she evaluated, on a maximum basis, their evidence (see p 128C–D).

[Bahasa Malaysia summary

Perayu-perayu telah dituduh di Mahkamah Majistret Kuala Lumpur pada 14 Mac 1992 di hadapan seorang majistret. Majistret dalam tempoh selama 6½ bulan telah mendengar 34 orang saksi untuk pihak pendakwaan. Pada 11 Januari 1993, seorang lagi majistret yang lain telah mengambil alih pembicaraan kes tersebut. Majistret kedua telah menolak satu permohonan untuk perbicaraan de novo dan telah meneruskan perbicaraan tersebut. Beliau telah mendengar keterangan 38 orang saksi tambahan yang lain sebelum pihak pendakwaan menutup kesnya pada 17 Mei 1993. Ketika pihak pendakwaan menutup kesnya di hadapan majistret kedua selepas saksi yang ke-72, peguam bagi pihak setiap satu perayu berhujah bahawa tiada kes prima facie telah dibuat terhadap perayu-perayu. Timbalan pendakwa raya yang bijaksana sebaliknya berhujah bahawa satu kes prima facie telah dibuat dan bergantung pada *Haw Tua Tau v PP* [1981] 2 MLJ 49 dan *Munusamy v PP* [1989] 1 MLJ 492. Pada waktu itu, Mahkamah Agung masih belum memberikan keputusannya bagi *Khoo Hi Chiang v PP* [1994] 1 MLJ 265. Selepas penghujahan di penutupan kes untuk pihak pendakwa, pada 16 Jun 1993 majistret yang bijaksana, dalam bergantung pada *Haw Tua Tau* dengan ujian prima facienya, telah meminta perayu-perayu supaya membuat pembelaan mereka ke atas tuduhan-tuduhan tersebut yang dibuat terhadap mereka. Selepas perayu-perayu membuat pembelaan mereka, kedua-dua mereka disabitkan atas kesemua tuduhan. Perayu pertama telah merayu.

Diputuskan, memerintahkan perbicaraan semula:

Ketika majistret membuat keputusan untuk meminta perayu-perayu membuat pembelaan mereka, beliau telah dengan jelasnya membuat keputusan bahawa pihak pendakwa telah membuktikan kesnya atas dasar prima facie. Dengan itu, majistret yang bijaksana telah dengan serius tersalah arah dirinya sendiri mengenai kaedah-kaedah berhubung darjah membukti di penutupan kes pihak pendakwa. Salah arah yang serius itu bukan sahaja berhubung dengan undang-undang prosedur tetapi berhubung dengan undang-undang substantif. Dengan itu, salah arah yang sedemikian tidak boleh dipulihkan oleh s 422 Kanun Acara Jenayah (FMS Bab 6) (lihat ms 126I dan 127A, H).

Lagipun, bukan sahaja tidak terdapat penilaian maksima ke atas keterangan, hakikatnya kekal bahawa majistret kedua telah meneruskan perbicaraan kes daripada saksi yang ke-35 hingga yang

ke-72 dan telah tidak melihat atau pun mendengar 34 saksi yang awal. Walaupun majistret kedua tidak mempunyai kewajipan untuk meneliti secara kritikal keterangan yang dicatat oleh majistret pertama terhadap tuduhan-tuduhan asalkan terdapat keterangan yang mana secara sedia ada adalah tidak mustahil, tidak terdapat apa-apa dalam rekod semasa bagi menunjukkan bahawa beliau telah menilai keterangan mereka atas dasar maksima (lihat ms 128C–D).]

Notes

For cases on close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reisssue) paras 2899–2915.

Cases referred to

A Ragunathan v PR [1982] 1 MLJ 139 (refd)
Adlan v PP [1965] 1 MLJ 142 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Bahruni bin Ismail v PR [1997] 2 MLJ 265 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Ishak Shaari v PP [1997] 3 CLJ Supp 222 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Surandran a/l Rajaretnam v PP [1998] 2 MLJ 49 (refd)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 60, 92
Criminal Procedure Code (FMS Cap 6) s 422
Penal Code (FMS Cap 45) s 182

Appeal from: Magistrates' Court, Kuala Lumpur (Magistrates' Court No E 82–1 of 1992, E 82–2 of 1992, E 83–83 of 1992 and E 83–84 of 1992, and Criminal Appeal Magistrates' Court No 41–123 of 1997)

Karpal Singh (*Karpal Singh & Co*) for the first appellant.
S Arunan (*Arunan & Associates*) for the second appellant.
Stanley Augustin (Deputy Public Prosecutor) for the prosecution.

Cur Adv Vult

KC Vohrah J: The Criminal Procedure Code (FMS Cap 6) ('the CPC') was amended on 30 January 1997 by the Criminal Procedure (Amendment) Act 1997 to provide for a prima facie standard of proof at the close of the case of the prosecution. This followed Parliament's disagreement with the majority view of the Federal Court in *Arulpragasan a/l Sandaraju v PP*

A [1997] 1 MLJ 1 that the duty of the prosecution at the end of its case is to prove a case beyond reasonable doubt.

It has been held in the Federal Court case of *Bahruni bin Ismail v PR* [1997] 2 MLJ 265 that the amendment which came into force on 31 January 1997 has no retrospective effect, ie the amendment would only be applicable B to cases filed after that date and not to cases before that date. This has been reiterated in another Federal Court case, *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 where Peh Swee Chin FCJ stated at p 16:

> The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to such act or omission before 31 January 1997. For such act or C omission committed before 31 January 1997, the test laid down in *Arulpragasan*'s case, ie that of proof beyond a reasonable doubt at the close of the prosecution's case would still apply.

Peh Swee Chin FCJ then proceeded to give the reasons for the court saying so (see the same and the next following pages); I shall advert to one D of the reasons later in this decision.

The case of *Arulpragasan* in effect provides an exegesis on the differences between proof beyond a reasonable doubt and a prima facie case at the end of the prosecution case and critically examines the cases of *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 and *Haw Tua Tau v PP* [1981] 2 MLJ 49. *Khoo Hi* E *Chiang* dealt with Lord Diplock's test enunciated in the Privy Council case of *Haw Tua Tau* which requires only a minimal evaluation of the evidence at the close of the case of the prosecution to ensure it is not inherently incredible, a test which was adopted in Malaysia by the then Federal Court in *A Ragunathan v PR* [1982] 1 MLJ 139 and by the then Supreme Court in *Munusamy v PP* [1987] 1 MLJ 492. The Supreme Court in *Khoo Hi* F *Chiang* rejected that test and decided that at the close of the prosecution case the duty of the court is to undertake, not a minimal evaluation of the evidence tendered by the prosecution, but a maximum evaluation of such evidence, to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

G The instant case under appeal concerns acts constituting offences allegedly committed in 1991, well before the date the amendment providing for a prima facie standard of proof at the close of the prosecution case was introduced. The test that had to be adopted by the trial magistrate in the case should have been proof beyond reasonable doubt at the close of the H prosecution case.

The hearing of this case against the two appellants (Mohd Amin @ Kanaperan and Siti Khatijah bte Abdullah @ Mary Anne) at the Kuala Lumpur Magistrates' Court commenced on 14 March 1992 before a magistrate.

I Siti Khatijah @ Mary Anne faced two charges under s 182 of the Penal Code (FMS Cap 45) for giving false information to police officers with intent to cause them to use their lawful power to the injury of certain persons and seven charges of criminal defamation under s 499 of the same code in respect of several persons.

Mohd Amin @ Kanaperan was charged with abetting Siti Khatijah @ Mary Anne in committing the two offences under s 182. He faced an additional seven charges of criminal defamation under s 499 of the same several persons allegedly criminally defamed by Siti Khatijah @ Mary Anne.

The magistrate over a period of 6½ months heard 34 witnesses for the prosecution. On 11 January 1993, another magistrate took over the hearing of the case. When the second magistrate took over the hearing, there was an application for a trial de novo by counsel for one of the accused on the ground that the new magistrate had had no opportunity to assess the credibility of the 34 witnesses, some of whom were important witnesses, the main complaint being that their demeanour could not be assessed. The magistrate, however, proceeded with the trial and she heard the evidence of an additional 38 witnesses before the prosecution closed its case on 17 May 1993.

When the prosecution closed its case before the second magistrate after the 72nd witness, counsel for each of the accused attacked, inter alia, the credibility of the prosecution witnesses at length. They both argued that no prima facie case had been made out against both the accused. The learned DPP on the other hand argued that a prima facie case had been made out and relied on *Haw Tua Tau* and *Munusamy*. At that time, the Supreme Court had not given its decision on *Khoo Hi Chiang*.

After the submissions at the close of the case for the prosecution, the learned magistrate on 16 June 1993 called upon both the accused to make their defence on the charges preferred against them. She stated (see appeal record at p 621):

> Setelah mahkamah mendengar keterangan-keterangan daripada seramai 72 orang saksi serta penghujahan-penghujahan panjang lebar kesemua pihak, mahkamah dapati pihak pendakwaan telah berjaya membuktikan kes prima facie ke atas kesemua 18 pertuduhan ke atas OKT 1 dan 2.

It is clear that *Haw Tua Tau* with its prima facie test was the basis of the magistrate's reason for calling upon the accused to make their defence on their charges. As mentioned before, *Khoo Hi Chiang* requiring proof beyond reasonable doubt at the close of the prosecution case had not been decided yet. *Khoo Hi Chiang* was decided on 24 December 1993.

After the two accused had made their defence, both of them were convicted on all the charges.

By the time the learned magistrate gave her grounds on the whole case, it was already 27 February 1995, about two years after *Khoo Hi Chiang* had been decided. There is no doubt, with the benefit of hindsight, she was then well aware of *Khoo Hi Chiang* and she adverted (see appeal record, (Vol 5) at p 1809) to proof beyond reasonable doubt being required at the close of the prosecution case, but the fact remains that when she made the decision to call the two accused to make their defence, the Supreme Court case of *Khoo Hi Chiang* had not been decided as yet and she had clearly in her contemporaneous note written on 16 June 1993 made a finding that the prosecution had proved its case on a prima facie basis. The learned magistrate had — and I must state here, that appeared to be the prevailing view of the law at that stage though it was the wrong

A view — seriously misdirected herself on the law. The serious misdirection was not merely on procedural law but on substantive law. I say the serious misdirection is on substantive law as well because an important right requiring a higher burden of proof on the prosecution, proof beyond a reasonable doubt at the close of the prosecution case on every ingredient of the offences, accrued to the two accused who were charged with the B offences in the case. I had earlier adverted to the two reasons which the Federal Court in *Dalip Bhagwan Singh* advanced for holding the CPC amendment relating to prima facia proof at the close of the prosecution case being not retrospective. One of the reasons relating to the important right accruing to an accused person where the proof is one beyond a C reasonable doubt at the close of the prosecution case is seen in this passage (at p 16) by Peh Swee Chin FCJ:

> Assuming that the said amendment had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art 7(1) of the Federal Constitution in the manner mentioned below. Article 7(1) D reads as follows:
>
> > 'No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.'
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> The said amendment if enacted to operate retrospectively would have so E run foul because *if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more.* But if the act or omission in question not punishable in the way stated above can be proved by way of a prima facie case at the close of the prosecution's case (a F much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution's case, and such failure will be punished in a manner as provided by law. Article 7(1) of the Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter. (Emphasis added.)

G I wish to refer to the decision of Augustine Paul JC in *Ishak Shaari v PP* [1997] 3 CLJ Supp 222 where he discusses the rules relating to burden of proof and concludes that rules relating to burden of proof are largely rules of substantive law. I agree with his views.

The misdirection being one not merely a procedural one but one on H substantive law cannot be cured by s 422 of the CPC. I would adopt the views of Augustine Paul JC in *Ishak Shaari* where he has dealt extensively with the ambit of s 422 and the different types of breaches which can be cured under s 422 and those which cannot and Augustine Paul JC has adverted to *Adlan v PP* [1965] 1 MLJ 142 where Ong J (as he then was) I stated that s 422 cannot be invoked where there is a breach of 'a cardinal principle in the administration of justice'. He has also cited the Supreme Court decision in *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 where reference was made to 'a principle of general importance to the administration of criminal justice' where s 422 cannot be applied.

The Court of Appeal in *Surandran a/l Rajaretnam v PP* [1998] 2 MLJ 49 had obviously in mind *Adlan* and *Yap Sing Hock* when Shaik Daud JCA, agreeing with counsel for the appellant that the judge of the sessions court had erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution, had this to say (at p 52):

> ... We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

Whatever the expressions that can be used to describe the breach, here is a case of a breach of substantive law, not merely of procedural law and s 422 of the CPC cannot be invoked. Then again, not only was there no maximum evaluation of the evidence, the fact remains that the second magistrate continued the hearing of the case from the 35th to the 72nd witnesses and did not see nor hear the earlier 34 witnesses. Although the second magistrate had no duty to critically examine the evidence recorded by the first magistrate against altogether 18 charges so long as there was evidence which was not inherently incredible, there is nothing in the contemporaneous record to show that she evaluated, on a maximum basis, their evidence.

The Federal Court and the Court of Appeal have identical power under the proviso to s 92 and the proviso to s 60, respectively, of the Courts of Judicature Act 1964 to dismiss the appeal if the court considers no substantial miscarriage of justice has occurred. The High Court has no such power but I wonder if a rule of substantive law — relating to an important right requiring a higher burden of proof on the prosecution, proof beyond a reasonable doubt at the close of the prosecution case, accruing to an accused — is breached, a substantial miscarriage of justice has not occurred?

Suffice it to say the High Court has no power to act under s 422. The convictions and sentences against both the appellants on all the charges are reversed. In the interests of justice, however, I order a retrial of both the appellants on such charges as the Public Prosecutor deems fit.

Retrial ordered.

Reported by Loo Lai Mee